157-160

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 811.

HENRY N. FRISBIE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 27, 1894.

(15,695.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1894.

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
HENRY N. FRISBIE. } No. 2050.

F. B. Earhart, Esq., U. S. attorney, for the Government.

O. B. Sansum, Esq., for defendant, Henry N. Frisbie, plaintiff in error.

Writ of error to the circuit court of the United States, eastern district of Louisiana, New Orleans division, from the Supreme Court of the United States of America, returnable at the city of Washington, D. C., on the second Monday of October, A. D. 1894.

1 UNITED STATES OF AMERICA,
Eastern District of Louisiana.

Circuit Court of the United States for the Fifth Circuit & Eastern District of Louisiana, Holding Sessions at the City of New Orleans, Louisiana, of the November Term, 1893.

The grand jurors of the United States of America, duly empannelled & sworn, in and for the eastern district of Louisiana, in the said circuit court, on their oath present that Henry N. Frisbie, late of the eastern district of Louisiana, lawyer, on the third day of January, A. D. eighteen hundred and ninety-four, at the city of New Orleans, in the eastern district of Louisiana, and within the jurisdiction of this court then and there being, a person engaged in preparing, presenting, and prosecuting a claim for pension upon the said United States — entitled "An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor, and providing for pensions to widows, minor children, and dependent parents," approved 27 June, 1890, to wit, a claim made by and on behalf of one Julia Johnson, under the said act of Congress, as the widow of Lewis Johnson, deceased, late a soldier in the military service of the United States during the war of the rebellion, to wit, a private in Co. C, 87 Reg., Co. B, 84 U. S. C. Vol. Inf., feloniously and wrongfully did violate the provisions of the 4th section of the said act of Congress, in that he did then and there feloniously and wrongfully demand, receive, and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting, and prosecuting her said claim for pension aforesaid a sum of money greater than ten dollars, the exact amount thereof being to the jurors aforesaid unknown.

2. The jurors aforesaid, on their oath aforesaid, further present that the said Henry N. Frisbie, on the said third day of Janu-
2 ary, A. D. eighteen hundred and ninety-four, at the city of New Orleans, in the eastern district of Louisiana; and within the jurisdiction of this court then and there being, a person engaged in preparing, presenting, and prosecuting a certain other claim for

pension upon and against the United States made by and on behalf of the said Julia Johnson for pension under the provisions of the act of Congress of the said United States entitled "An act granting pensions to soldiers and sailors who are incapitated for the performance of manual labor, and providing for pensions to widows and minor children and dependent parents," approved 27 June, 1890, as the widow of Lewis Johnson, deceased, late a soldier in the military service of the United States during the war of the rebellion, as private in Co. B, 84 Regt. U. S. C. T. Cols., and died on 20 May, 1882, feloniously and wrongfully did violate the provisions of the 4th section of the said act of Congress, in that he, the said Henry N. Frisbie, did then and there demand, receive, and retain of and from the said Julia Johnson for his said services in preparing, presenting, and prosecuting her said claim a greater sum of money than ten dollars, the exact amount being to the said jurors unknown; which said claim is in words of figures as follows, to wit:

Act of June, 1890.

Declaration for Widows' Pensions.

STATE OF LA., } ss:
County of Orleans, }

On this 9th day of March, A. D. one thousand eight hundred and ninety-one, personally appeared before me, M. de Lucas, of the 4th city court, N. O., La., court, the same being a court of record within & for the county aforesaid, Julia Johnson, aged seventy years, who, being duly sworn according to law, declares that she is the widow of Lewis Johnson, who enlisted under the name of Lewis Johnson, at Alexandria, La., on the 8th day of April, A. D. 1864, in
3 Company B, private, 84th regiment of U. S. 6 infantry, & served two years 16 days, and served at least ninety days in the late war of the rebellion, & who was honorably discharged on the 14th day of March, 1866, and died on the 25th day of May, 1882, at New Orleans, Louisiana; that she was married, under the name of Julia Simmons, to said Lewis Johnson on the 27th day of February, 1866, by Rev. Miles, at New Orleans, there being — legal barrier to said marriage. Neither one was ever married previous to the time above stated. That she has not remarried since the death of the said Lewis Johnson; that she is without other means of support than her daily labor. The names & dates of birth of all the children now living under sixteen years of age of the soldier by herself are as follows: None. That she has heretofore applied for pension and the number of her former application is —. She makes this declaration for the purpose of being placed on the pension-roll of the United States under the provisions of the act of June, 1890. She hereby agrees to pay her attorneys the lawful fee of $10 for their services when pension is allowed. She hereby appoints L. C. Wood & Co., U. S. pension attorneys, 512 F street N. W., Washington, D. C., her true & lawful attorneys to prosecute her claim. That

her post-office address is #179 Hillary street, of Carrollton, State of La.

her
JULIA x JOHNSON.
mark.

Attest:
ROBERT THOMPSON.
THOMAS FREEMAN.

Also personally appeared Rob't Thompson, residing at Washington, 4th & Plum Sts., and Thos. Freeman, residing at Burthe & Adam Sts., persons whom I certify to be respectable and entitled to credit, & who, being by me duly sworn, say they were present & saw the claimant sign her name (or make her mark) to the foregoing declaration; that they have every reason to believe from the appearance of said claimant and an acquaintance with her
4 of — years and — years respectively that she is the identical person she represents herself to be, & that they have no interest in the prosecution of this claim.

A. J. FISHER.

Sworn to & subscribed before me this 9th day of M'ch, A. D. 1891.

And I hereby certify that the contents of the above declaration, &c., were fully made known & explained to the applicant & witnesses before swearing, including the words —, erased, and the words —, added, and that I have no interest, direct or indirect, in the prosecution of this claim.

M. DE LUCAS.
4th City Court, New Orleans, La. [SEAL.]

(Endorsed:) 606,618. Widows' pension. Mrs. Julia Johnson, widow of Lewis Johnson, late priv. Co. B, of the 84 reg't of U. S. C. T., vols. —. Contrary to the form of the statute of the United States of America in such case made & provided & against their peace & dignity. J. W. Gurley, ass't U. S. att'y.

Demurrer to Indictment. Filed Jan. 19, 1894.

Circuit Court of the United States for the Eastern District of Louisiana.

UNITED STATES
vs. No. 2050. Indictment for Illegal Fee.
HENRY N. FRISBIE.

Now into court comes defendant and demurs to the said indictment on the ground that the law under which said indictment was found is unconstitutional and void, for the reason that Congress has no power — regulate the price of labor nor impair the obligation of contracts.

5 2. That only the pensioner can make complaint. No case can be maintained unless affidavit is made by pensioner.

3. Charge is not sustained by the claim set out.

Wherefore defendant prays this demurrer be sustained and the indictment quashed and he discharged.

(Signed) H. N. FRISBIE,
Att'y for Defendant.

Order: Demurrer Overruled.

Extract from the Minutes, November Term, 1893.

NEW ORLEANS, WEDNESDAY, *January* 24, 1894.

Court met pursuant to adjournment.
Present: Hon. Aleck Boarman, district judge.

UNITED STATES
vs. } No. 2050.
H. N. FRISBIE.

This cause having been heretofore argued and submitted upon the demurrer herein filed by the defendant to the indictment and the court having considered the same—
It is now ordered that the demurrer be overruled.

Plea of Not Guilty.

Extract from the Minutes, November Term, 1893.

NEW ORLEANS, THURSDAY, *February* 8, 1894.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

6 UNITED STATES
vs. } No. 2050.
HENRY N. FRISBIE.

The accused herein, Henry N. Frisbie, being this day arraigned at the bar of the court, waived the formal reading of the indictment herein found and presented against him January 16, 1894, and thereto pleaded not guilty; whereupon it was ordered that his said plea be recorded, and it is done accordingly.

Trial and Verdict of Guilty.

Extract from the Minutes.

FEBRUARY 8, 1894.

UNITED STATES
vs. } No. 2050.
HENRY N. FRISBIE.

This cause was called for trial—present, F. B. Earhart, United States attorney, who prosecutes for and on behalf of the United States; Henry N. Frisbie, the accused, in person, who stands charged with feloniously and wrongfully demanding, receiving, and retaining of and from Julia Johnson, a claimant for a pension on account

of the death of the soldier Lewis Johnson, Co. B, 84 U. S. C. T., for his services in preparing, presenting, and prosecuting her claim a sum of money greater than ten dollars, in violation of statutes of the United States, vol. 26, p. 183, sec. 4, the said accused defending himself—whereupon the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit,
7 1, C. M. Murray; 2, Jno. S. Dietrich; 3, M. Gradwohl; 4, Chas. Joubert; 5, F. Irving; 6, H. Gastrock; 7, B. Vigne; 8, E. J. Nelson; 9, B. H. Forrest; 10, Geo. Landry; 11, T. B. Stamps; 12, Jas. Prevost; and the trial was proceeded with, C. M. Murray being appointed foreman of the jury. After hearing the evidence, arguments of counsel, and receiving a charge from the court, the jury retired to deliberate as to their verdict. After due deliberation the said jury returned into court, and then and there in open court, the U. S. attorney and the accused being present, through their foreman, C. M. Murray, did render, declare, and deliver the following verdict, "Guilty"; whereupon the court did order the said verdict to be so recorded and that the prisoner be remanded.

Motion for a New Trial. Filed Feb'y 10, 1894.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES } *vs.* } No. 2050. Indictment for Illegal Fees.
H. N. FRISBIE. }

Now into court comes defendant herein and moves for a new trial on the ground that the verdict is against the law and the evidence, in this:

That payment, as defined by act of Congress, is mailing check to pensioner, after which the Government has no further control of said money.
8 And on the further grounds that the claim set out in the indictment showed that I was not named in it, and the pensioner testified I never had anything to do with said claim.

And on the further ground that the court erred in not confining all witnesses to that particular claim set out in the indictment, and that it was in error for claimant and Louisa Burnet to testify they came to my office to consult me about the claim and that I had promised to write about it for her.

And the admission of the two specials, Montgomery and Whitehead, to testify that I had admitted I was the attorney and was collecting a fee as such.

In this, if it was a fact I had been the attorney, it would appear in the record, and the attempt of the district attorney to prove a written document by parole evidence was illegal, as the paper itself is the highest evidence.

And, further, there is no way to prepare, present, or prosecute a pension claim but by written documents, and no attorney or other person can be prosecuted who does not do one or all of those acts, not by talking but by writing.

And, further, the court erred in not giving the instruction ask-for by defendant, that—

If the jury believe from the evidence that defendant charged for and collected a fee for assisting to cash said check only, then he should be acquitted.

For these reasons the accused prays the court to grant him a new trial.

(Signed) H. N. FRISBIE, *in P. P.*

9 *Order: New Trial Refused.*

Extract from the Minutes.

JUNE 29, 1894.

UNITED STATES } No. 2050.
vs.
H. N. FRISBIE. }

This cause came on to be heard at this term upon the rule for a new trial filed herein by the defendant, and, after argument of counsel, was submitted.

The court having duly considered the same, it is ordered, for the reasons orally assigned, that a new trial be, and the same is hereby, refused.

Motion in Arrest of Judgment. Filed July 2, 1894.

U. S. Circuit Court, Eastern District of Louisiana.

UNITED STATES } No. 2050.
vs.
H. N. FRISBIE. }

And now comes H. N. Frisbie, defendant in the above-named case, and moves the court to arrest the judgment upon the verdict against him herein upon the grounds following, viz:

1st. Because the first count in said indictment concludes contrary to the form of the statutes of the United States and not according to form of the statute, as by law required.

2. Because the second count in said indictment disclos*ing* on its face that the claim which defendant is charged to have prepared, presented, and prosecuted was not so prepared, presented, or prosecuted by said defendant, but by L. C. Wood & Co.

3rd. Because said act of Congress imposing a penalty upon
10 the person who shall contract for or retain, demand, or receive a greater fee than $10 for his services in preparing, presenting, or prosecuting a claim for a pension undertakes to fix the price of labor for services in such cases, to that extent is unconstitutional.

Wherefore defendant prays that judgment on said verdict be arrested, and that — go hence without day.

(Signed) ROUSE & GRANT,
A. G. BRICE, *Att'ys.*

Order: Motion for Arrest of Judgment Overruled.

Extract from the Minutes.

JULY 2, 1894.

UNITED STATES } No. 2050.
vs.
HENRY N. FRISBIE. }

Henry N. Frisbie, the defendant herein, through his counsel, J. D. Rouse, Esq., this day presented a motion in arrest of judgment in this case.

Whereupon, the court having considered the same, it is ordered that the motion be, and the same is hereby, overruled.

Sentence.

Extract from the Minutes.

JULY 2, 1894.

UNITED STATES } No. 2050.
vs.
HENRY N. FRISBIE. }

11 Henry N. Frisbie, the defendant herein, having been heretofore duly indicted and arraigned, and afterwards, to wit, on the 8th day of February, 1894, tried on the said indictment and found guilty by the jury of the charges preferred against him, to wit, feloniously and wrongfully demanding, receiving, and retaining of and from one Julia Johnson, a pension claimant, for his services in preparing, presenting, and prosecuting her claim a sum of money greater than ten dollars, in violation of the statutes of the United States, vol. 26, p. 183, sec. 4, and, being this day present, was called to the bar of the court for sentence and judgment for the offences against the laws of the United States set out and charged in said indictment.

Wherefore, being inquired of if he had anything to say why sentence should not be pronounced against him, he failed to urge any reason good and sufficient in law.

It is considered and adjudged by the court, by reason of the verdict of guilty as aforesaid, that the said Henry N. Frisbie be imprisoned at hard labor in the Kings County penitentiary, at Brooklyn, State of New York, for and during the period of three months from July 2, 1894, the said penitentiary being the place duly selected by the hon. the Attorney General of the United States for the imprisonment of persons convicted of offences against the laws of the United States in the courts thereof in this district.

It is further ordered that the marshal of the United States for the eastern district of Louisiana do carry this sentence into execution forthwith.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

12 CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 12 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of The United States *vs.* Henry N. Frisbie, No. 2050 of the docket of the said court.

[SEAL.] Witness my hand and the seal of said court, at the city of New Orleans, this 7th day of July, A. D. 1894.

(Signed) E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 7th day of July, A. D. 1894.

(Signed) CHARLES PARLANGE, *Judge.*

Assignment of Errors.

First. The court erred in overruling defendant's demurrer to the indictment.

Second. The court erred in overruling defendant's motion in arrest of judgment—

13 Because (*a*) the indictment fails to show that defendant undertook or was in any manner concerned in procuring any claim for any pension for Julia Johnson.

(*b.*) The indictment fails to show that any pension was allowed to or was paid to Julia Johnson.

(*c.*) The indictment fails to show what, if any, part of the pension money was withheld by defendant. The indictment adopts the prohibitory words of the statute, namely, "a sum of money greater than ten dollars," but this allegation is not sufficient to authorize a criminal prosecution; there must appear upon the face of the indictment a substantial, not a frivolous, disregard of the act of Congress.

(*d.*) The indictment fails to show a demand upon the defendant for the money wrongfully withheld. A thing cannot be wrongfully withheld until it is claimed and a demand for delivery is made.

(*e.*) Nothing but the wrongful withholding of the whole or a part of a claim or pension allowed is within the range of the statute; nothing but that constitutes an offence. But there is no averment

in the indictment tending to show that defendant withholds either the whole or a part of a pension allowed or paid to Julia Johnson.

(*f.*) All the foregoing errors and reasons are now repeated and urged against the second count of the indictment. In that count the claim prepared and presented in behalf of Julia Johnson appears to have been prepared and presented by persons other than the defendant, and that the defendant is not named or mentioned or in any way concerned in that claim.

Third. Congress has forbidden the payment of any pension to any person other than the pensioner, and after the pension money has been paid to the pensioner Congress has no power to prevent
14 the pensioner from using the money for any purpose whatsoever.

Fourth. The act of Congress of the 27th of June, 1890, in so far as it pretends to prohibit a lawyer from contracting for compensation for a fee larger than ten dollars for his professional services, is unconstitutional and void.

Fifth. The first count of the indictment does not conclude as the law declares all indictments and counts shall conclude.

Sixth. The whole indictment is void *ab initio*, because there is nothing to show that the grand jury found a true bill against the defendant, Henry N. Frisbie.

Seventh. The judgment and sentence are void; they have been rendered by "circuit court of the United States for the fifth circuit and eastern district of Louisiana," a court not known in the laws of the United States.

(Signed) O. B. SANSUM,
Att'y for the Def't, Henry N. Frisbie.

Ordered that a writ of error, to operate as a supersedeas, do issue in the within-entitled cause, returnable on the second Monday of October, A. D. 1894, at Washington, in the Supreme Court of the United States, upon the defendant, Henry N. Frisbie, giving bond with sureties in the sum of one thousand dollars, said bond to be approved by any circuit or district judge of the courts of the United States in the eastern district of Louisiana; said bond to be conditioned as the law directs, and the marshal is ordered to release the said defendant, Henry N. Frisbie, from custody until further order shall be made by the Supreme Court of the United States
15 in the premises.

Dated this ninth day of July, A. D. 1894.

(Signed) HOWELL E. JACKSON,
Associate Justice of Supreme Court U. S.

Bond of Defendant. Filed July 13, 1894.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

Know all men by these presents that we, Henry N. Frisbie, as principal, and Doretha Welp and William Schelich, as sureties, do hereby acknowledge ourselves to owe and to be indebted to the United States of America in the just and full sum of one thousand dollars; for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated at New Orleans, in the said district, this thirteenth day of July, A. D. 1894.

The condition of the above obligation is such that whereas the said Henry N. Frisbie has been sentenced to imprisonment in the penitentiary at Brooklyn, New York, in cause No. 2050 of the docket of the circuit court of the United States for the said eastern district of Louisiana, entitled United States *vs.* Henry N. Frisbie, the said sentence having been rendered on a conviction in said cause for the offence of feloniously and wrongfully demanding, receiving, and retaining from one Julia Johnson, a pension claimant, for his services in preparing, presenting, and prosecuting her claim a sum of money greater than ten dollars, in violation
16 of the statute of the United States, vol 26, page 183, sec. 4; and whereas said Henry N. Frisbie is now in the custody of the marshal for the said district and has been allowed a writ of error from said conviction and sentence to the Supreme Court of the United States by an order of the Honorable Howell E. Jackson, associate justice of said Supreme Court, of date July 9th, 1894; and whereas by the said order said Howell E. Jackson, associate justice, has allowed said Henry N. Frisbie to give bond for his release during the pendency of said writ of error from the custody of the said United States marshal for said district, in whose custody the said Henry N. Frisbie now is;

Now, therefore, if the said Henry N. Frisbie shall abide fully and in all matters and things the judgment of the said Supreme Court of the United States upon said writ of error in said cause, and especially if said Henry N. Frisbie shall, in case the said Supreme Court shall affirm said sentence, forthwith surrender his body to the custody of said marshal of said district, then this obligation shall be null and void; otherwise it shall be and remain in full force and effect.

(Signed) HENRY N. FRISBIE.
DORETHEA WELP.
WM. SCHLEICH.

Subscribed and acknowledged before me, at my office, in the city of New Orleans, this 13th day of July, A. D. 1894.

[SEAL.] (Signed) H. J. CARTER,
U. S. Commissioner.

17 EASTERN DISTRICT OF LOUISIANA, *ss:*

Dorethea Welp, being duly sworn, says she resides in the city of New Orleans and is worth the sum of ten thousand dollars over and above all her just debts and liabilities, excluding all homestead exemptions.

(Signed) DORETHEA WELP.

Sworn to and subscribed before me this 13th day of July, A. D. 1894.

[SEAL.] (Signed) H. J. CARTER,
U. S. Commissioner.

EASTERN DISTRICT OF LOUISIANA, *ss:*

William Schelich, being duly sworn, upon oath states he resides in the city of New Orleans and he is worth the sum of three thousand five hundred dollars over and above all his just debts and liabilities, excluding all homestead exemptions.

(Signed) WM. SCHLEICH.

Sworn to and subscribed before me this 13th day of July, 1894.

(Signed) H. J. CARTER,
[SEAL.] *U. S. Commissioner.*

Approved.
New Orleans, July 13th, 1894.

(Signed) CHARLES PARLANGE,
U. S. Judge.

18 Know all men by these presents that we, Henry N. Frisbie, as principal, Doretha Welp and William Schelcich, as sure-, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars, to be paid to the said United States of America, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein The United States of America were plaintiffs and said Henry N. Frisbie was defendant (No. 2050 of the docket), judgment was rendered against said Henry N. Frisbie, sentencing him to the penitentiary at Brooklyn, New York, and the said Henry N. Frisbie having obtained a writ of error, to operate as a supersedeas, from said sentence, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them

to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Henry N. Frisbie shall prosecute his said writ to effect and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HENRY N. FRISBIE. [L. S.]
" DORETHA WELP. [L. S.]
" WM. SCHLEICH. [L. S.]

Sealed and delivered in the presence of—
(Signed) H. J. CARTER,
U. S. Commissioner.

Approved.
New Orleans, July 13th, 1894.
(Signed) CHARLES PARLANGE, *U. S. Judge.*

19 [Endorsed:] No. 2050. United States circuit court, eastern district of Louisiana. United States *vs.* Henry N. Frisbie. Bond for writ of error. Filed July 13, 1894. —— ——, clerk.

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States and Henry N. Frisbie, No. 2050 of the criminal docket of the said circuit court, a manifest error hath happened, to the great damage of the said Henry N. Frisbie, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13 day of July, in the year of our Lord one thousand eight hundred and ninety-four.

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

21 [Endorsed:] United States circuit court. No. 2050. United States *versus* Henry N. Frisbie. Writ of error. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed July 13, 1894. E. R. Hunt, clerk.

22 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Henry N. Frisbie is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Henry N. Frisbie, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13 day of July, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES PARLANGE, *Judge.*

23 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 2050. United States *vs.* Henry N. Frisbie. Citation. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed July 13, 1894. E. R. Hunt, clerk.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., July 13, '94.

On this 13th day of July, 1894, before the undersigned authority personally came and appeared T. I. Galbreth, deputy United States marshal for the eastern district of Louisiana, who, being duly sworn, says he served copy hereof on the United States by handing the same to Hon. F. B. Earhart, United States attorney, in person, in the city of New Orleans, Louisiana, on July 13th, 1894.

T. I. GALBRETH.

Sworn to and subscribed before me on this 13th day of July, 1894.

E. R. HUNT, *Clerk.*

24 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 19 pages contain and form a full, complete,

true, and perfect transcript of the record and proceedings had, including the assignment of errors, the order of Mr. Justice Howell E. Jackson, bond of Frisbie and sureties, approved July 13, '94; bond for writ of error, citation, & writ of error, in the case of The United States *vs.* Henry N. Frisbie, No. 2050 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 24th day of July, A. D. 1894.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 24th day of July, A. D. 1894.

CHARLES PARLANGE, *Judge.*

25 In the Supreme Court of the United States, to the October Term, A. D. 1894.

HENRY N. FRISBIE, Plaintiff in Error,
vs.
THE UNITED STATES, Defendants in Error.

Assignment of Errors.

1st. The matters and things stated in the first count of said indictment are not sufficient in law to constitute and do not constitute a crime against the statutes of the United States.

2nd. There is no averment in said first count that defendant, as attorney or agent of Julia Johnson, prepared, presented, or prosecuted any claim for a pension for said Julia Johnson.

3rd. There is no averment in said first count that any claim for pension was ever presented or was ever prosecuted by any person for or in behalf of said Julia Johnson.

4th. There is no averment in said first count that said Julia Johnson was entitled to any pension of the United States.

5th. There is no averment in said first count that any pension was ever allowed or paid to said Julia Johnson or to any person for her.

6th. There is no averment in said first count that any pension money was ever paid to or received by the defendant for Julia Johnson.

26 7th. The averment that defendant did "then and there wrongfully demand, receive, and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting, and prosecuting her said claim for pension, as aforesaid, a sum

of money greater than ten dollars, the exact amount thereof being to the jurors unknown," is not an averment of issuable facts, but is a mere legal conclusion.

8th. The indictment upon its face shows a proceeding in the "circuit court of the United States for the fifth circuit and eastern district of Louisiana," but there is no court so named; therefore the indictment is void.

9th. The said first count does not commence or conclude as the statutes of the United States command and direct.

10th. The matters and things stated in the second count of said indictment are not sufficient in law to constitute and do not constitute a crime against the statutes of the United States.

11th. There is no averment in said second count that defendant, as attorney or agent of Julia Johnson, prepared, presented, or prosecuted any claim for a pension for said Julia Johnson.

12th. There is no averment in said second count that any claim for pension was ever presented or was ever prosecuted by any person for or in behalf of said Julia Johnson.

13th. There is no averment in said second count that said Julia Johnson was entitled to any pension of the United States.

27 14th. There is no averment in said second count that any pension was ever allowed or paid to said Julia Johnson or to any person for her.

15th. There is no averment in said second count that any pension money was ever paid to or received by the defendant for Julia Johnson.

16th. The averment that defendant did "then and there wrongfully demand, receive, and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting, and prosecuting her said claim for pension, as aforesaid, a sum of money greater than ten dollars, the exact amount thereof being to the jurors unknown," is not an averment of issuable facts, but is a mere legal conclusion.

17th. The indictment upon its face shows a proceeding in the circuit court of the United States for the fifth circuit and eastern district of Louisiana, but there is no court so named; therefore the indictment is void.

18th. The said second count does not commence or conclude as the statutes of the United States command and direct.

19th. The said second count shows upon its face that defendant had no participation in preparing, presenting, or prosecuting Julia Johnson's claim for pension, but that L. C. Wood & Co., of Washington, D. C., were her lawful attorneys to prosecute it, for a fee of ten dollars. Therefore no part of the pension money, under any circumstances, could pass to defendant's possession except through Julia Johnson's hands, brought about by the fraudulent devices and pretences practiced by defendant upon Julia Johnson,

28 and these fraudulent devices and pretences of defendant, if any, must be averred upon the face of the indictment, and as none are averred the indictment is fatally defective and the judgment should have been arrested by the court below.

20th. The act of Congress of the 27th June, 1890, embraces only attorneys and agents; it does not include lawyers; but if it does include lawyers, then it is void, for Congress has no constitutional power to limit lawyers' fees, even in pension cases.

21st. There can be no wrongful withholding of pension money until the pensioner demands what is wrongfully withheld, but there is no averment in either count tending to show that Julia Johnson claimed or demanded any money of defendant.

22nd. There is nothing to show that the grand jury found a true bill against the defendant.

O. B. SANSUM,
Attorney for Plaintiff in Error.

New Orleans, La., August 4th, 1894.

[Endorsed:] No. —. Supreme Court U. S., October term, 1894. Henry N. Frisbie, pl'f in error, *vs.* United States, def'ts in error. Assignment of errors. O. B. Sansum, attorney-at-law, 182 Gravier St., New Orleans.

Endorsed on cover: Case No. 15,695. E. Louisiana C. C. U. S. Term No., 811. Henry N. Frisbie, plaintiff in error, *vs.* The United States. Filed September 27, 1894.

Office Supreme Court, U. S.
FILED.
FEB 25 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1894.

No. 811.

HENRY N. FRISBIE, *Plaintiff in Error,*

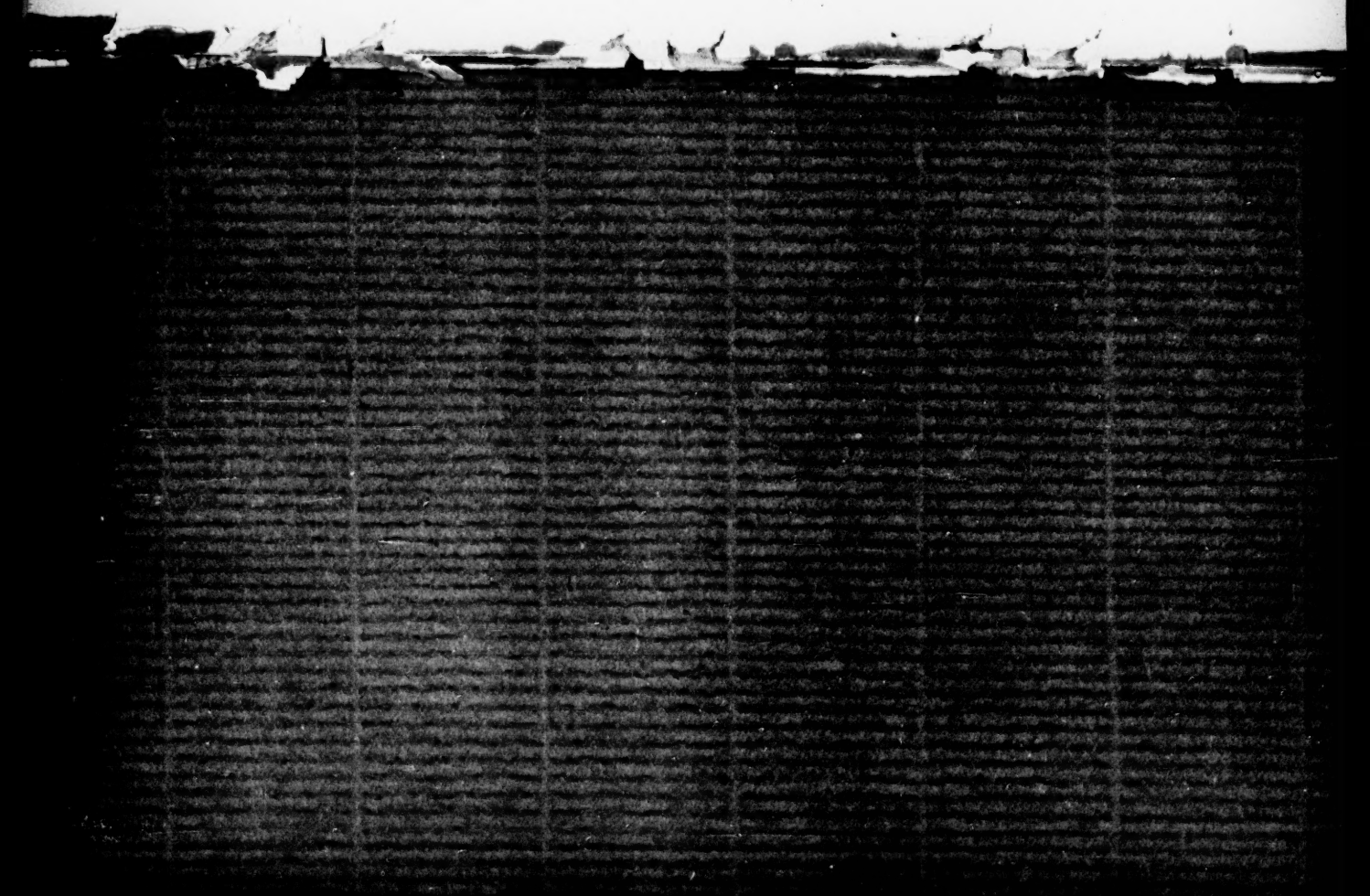
versus

UNITED STATES OF AMERICA, *Defendant in Error.*

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

O. B. SANSUM,
Attorney for Plaintiff in Error.

H. Powers' Print, N. O.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1894.

No. 811.

HENRY N. FRISBIE, *Plaintiff in Error*,

versus

UNITED STATES OF AMERICA, *Defendant in Error*.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

STATEMENT OF THE CASE.

The plaintiff in error was indicted, in two counts, in the court below, for violating the 4th section of the Act of Congress, approved June 27, 1890, for demanding, receiving and retaining pension money of one Julia Johnson.

The indictment charges that Henry N. Frisbie, lawyer, on the third day of January, 1894, at the City of New Orleans, in the Eastern District of Louisiana, and within the jurisdiction of this Court, then and there, being *a person* engaged in preparing, presenting and prosecuting a claim for

pension upon the said United States—entitled an act granting pensions to soldiers and sailors, etc., approved June 27th, 1890, "*to-wit*, a claim made on behalf of one Julia Johnson, under the said act of Congress, as the widow of Lewis Johnson, deceased, late soldier in the military service, etc., feloniously and wrongfully did violate the provisions of the 4th section of said act of Congress, in that he did, then and there, feloniously and wrongfully demand, receive and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting and prosecuting her said claim for pension aforesaid a sum of money greater than ten dollars, the exact amount thereof being to the jurors unknown."

Plaintiff in error demurred to the indictment. The demurrer was overruled. He pleaded not guilty and defending himself without assistance of counsel he was unfortunately found guilty. No bill of exceptions is in the record, because plaintiff in error only objected to the proceedings before the jury; but he omitted to except to the rulings of the Court, and, for that reason, the trial judge refused a bill of exceptions. Before judgment was entered he filed a motion in arrest of judgment, which was overruled, and being sentenced to hard labor in the penitentiary at Brooklyn, he procured from Mr. Justice Jackson an order for a writ of

error to operate as a supersedeas, and he brings the case to the Court here for review; and against the judgment of the said Circuit Court he sets forth the following:

ASSIGNMENT OF ERRORS.

1st. The matters and things stated in the first count of said indictment are not sufficient in law to constitute and do not constitute a crime against the statutes of the United States.

2nd. There is no averment in said first count that defendant, as attorney or agent of Julia Johnson, prepared, presented, or prosecuted any claim for a pension for said Julia Johnson.

3rd. There is no averment in said first count that any claim for pension was ever presented or was ever prosecuted by any person for or in behalf of said Julia Johnson.

4th. There is no averment in said first count that said Julia Johnson was entitled to any pension of the United States.

5th. There is no averment in said first count that any pension was ever allowed or paid to said Julia Johnson or to any person for her.

6th There is no averment in said first count that any pension money was ever paid to or received by the defendant for Julia Johnson.

7th. The averment that defendant did "then and there wrongfully demand, receive, and retain

of and from the said claimant, Julia Johnson, for his said services in preparing, presenting, and prosecuting her said claim for pension, as aforesaid, a sum of money greater than ten dollars, the exact amount thereof being to the jurors unknown," is not an averment of issuable facts, but is a mere legal conclusion.

8th. The indictment upon it face shows a proceeding in the "Circuit Court of the United States for the fifth circuit and eastern district of Louisiana," but there is no court so named; therefore the indictment is void.

9th. The said first count does not commence or conclude as the statutes of Unites States command and direct.

10th. The matters and things stated in the second count of said indictment are not sufficient in law to constitute and do not constitute a crime against the statutes of the United States.

11th. There is no averment in said second count that defendant, as attorney or agent of Julia Johnson, prepared, presented, or prosecuted any claim for a pension for said Julia Johnson.

12th. There is no averment in said second count that any claim for pension was ever presented or was ever prosecuted by any person for or in behalf of said Julia Johnson.

13th. There is no averment in said second

count that said Julia Johnson was entitled to any pension of the United States.

14th. There is no averment in said second count that any pension was ever allowed or paid to said Julia Johnson or to any person for her.

15th. There is no averment in said second count that any pension money was ever paid to or received by the defendant for Julia Johnson.

16th. The averment that defendant did "then and there wrongfully demand, receive, and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting and prosecuting her said claim for pension, as aforesaid, a sum of money greater than ten dollars, the exact amount thereof being to the jurors unknown," is not an averment of issuable facts, but is a mere legal conclusion.

17th. The indictment upon its face shows a proceeding in the Circuit Court of the United States for the fifth circuit and eastern district of Louisiana, but there is no court so named; therefore the indictment is void.

18th. The said second count does not commence or conclude as the statutes of the United States command and direct.

19th. The said second count shows upon its face that defendant had no participation in preparing, presenting, or prosecuting Julia Johnson's

claim for pension, but that L. C. Wood & Co., of Washington, D. C., were her lawful attorneys to prosecute it, for a fee of ten dollars. Therefore no part of the pension money, under any circumstances, could pass to defendant's possession except through Julia Johnson's hands, brought about by the fraudulent devices and pretences practiced by defendant upon Julia Johnson, and these fraudulent devices and pretences of defendant, if any, must be averred upon the face of the indictment, and as none are averred the indictment is fatally defective, and the judgment should have been arrested by the court below.

20th. The act of Congress of the 27th June, 1890, embraces only attorneys and agents; it does not include lawyers; but if it does include lawyers, then it is void, for Congress has no constitutional power to limit lawyers' fees, even in pension cases.

21st. There can be no wrongful withholding of pension money, until the pensioner demands what is wrongfully withheld, but there is no averment in either count tending to show that Julia Johnson claimed or demanded any money of defendant.

22nd. There is nothing to show that the grand jury found a true bill against the defendant.

BRIEF AND ARGUMENT.

I.

The word, *lawyer*, found in the indictment is mere *descriptio personæ*. If the pleader had written the word, gentleman, or general, or yoeman—no one of these would bring the defendant within the meaning of the statute. For the statute declares, that no agent or attorney, or *other person*, shall receive a sum greater than ten dollars from any pensioner for preparing and prosecuting any claim for pension. The words, "*other person*," include only persons of the character named in the statute, *to wit*: attorneys or agents. A lawyer, unless he be the attorney or the agent of the pensioner is not within the reach of the statute. The indictment (both courts) are fatally defective, because there is no averment in either court that defendant acted in the capacity of agent or attorney for the pension claimant, Julia Johnson; the averment that defendant is a lawyer does not cure the defect.

II.

Defendant is charged in both counts as being a person engaged in preparing, presenting and prosecuting a claim for a pension upon the United States, under the act of Congress, June 27th, 1890, "*to-wit*, a claim made by and in behalf of one, Julia Johnson, and that he did, feloniously and

wrongfully violate the provisions of the 4th section of said act, in that he did, then and there, feloniously and wrongfully, demand, receive and retain of and from said claimant for his said services in preparing, presenting and prosecuting her said claim for pension aforesaid, a sum of money greater than ten dollars, *the exact amount thereof being to the jurors unknown.*"

There is no averment that defendant prepared or *presented or prosecuted* any claim for pension upon the United States. It does not follow that a person who is preparing and prosecuting a claim for pension does in fact prepare and prosecute it; for that person may at any time desist and cease to prepare and prosecute the claim. If Julia Johnson retained defendant, as her lawyer, to prepare, present and prosecute her claim for pension, defendant could abandon that employment, and she could accept his abandonment, and pay to him whatever sum of money she pleased to be rid of his services, and of his presence; and, in paying him for such services, even though she paid him a sum greater than ten dollars would be no violation of the fourth section of the statute. Unless defendant prepared, presented and prosecuted Julia Johnson's claim for pension, he is not within the purview of the statute; and, if he did prepare, present and prosecute her claim, the facts should

have been averred positively in both counts of the indictment. There being no positive averment in either count in that respect, the indictment is fatally defective. Defendant submits he is not within the meaning of the statute, until it shall appear by positive averments (not by inference) upon the face of the indictment that he did in fact prepare, present and prosecute Julia Johnson's claim for pension, as her agent or attorney. Two facts must concur. *First*, that defendant was Julia Johnson's agent or attorney. *Second*, that defendant prepared, presented and prosecuted her claim for pension. But the first count of the indictment contains no such averment; and the second count shows, upon its face, that defendant did not prosecute Julia Johnson's claim for pension, but that she appointed L. C. Wood & Co. her true and lawful attorneys to prosecute it. How then could defendant prosecute her claim?

III.

There is no averment that Julia Johnson was a pensioner of the United States, or that any money of any kind or character was ever paid to defendant for Julia Johnson, neither pension money nor any other money; nor that any pension money was ever paid to any person for Julia Johnson.

The purpose of the statute is to protect the pension money only—not to prohibit the citizen

(though a pensioner receiving pension money) from disposing of the money as he or she shall see fit and proper. Until it appears by positive averments, upon the face of the indictment that the pensioner's agent or attorney received and wrongfully withholds the whole or some part of a pension or claim allowed or due, the agent or attorney is not within the reach of the statute. The statute forbids all agents or attorneys of pensioners from directly or indirectly contracting, demanding, receiving or retaining "a sum greater than ten dollars, which sum, i. e., ten dollars, *shall be payable only upon the order of the Commissioner of Pensions by the pension agent making payment of the pension allowed;* and any person who shall violate any of the provisions of this section, or who shall WRONGFULLY WITHHOLD *from a pensioner or claimant the whole or any part of a pension or claim allowed or due such pensioner or claimant*, under this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined, not exceeding five hundred dollars, or be imprisoned, at hard labor, not exceeding two years."

The statute is not to be construed by reading separate parts of it. It is to be read as a whole; and by properly construing it there is no completed offense, until there appears a wrongful receiving

and withholding of the pensioner's *pension money*. But the indictment under examination utterly fails to show that Julia Johnson is or was a pensioner, or that she is or was entitled to a pension; the statute covers only the pensioner's pension money—nothing else, and upon this subject the indictment is silent.

In *United States vs. Scot*, 25th Fed. Rep., 470, the Court ruled that the Pension Commissioner's order allowing the pension being matter f record could not be proved by parol. The testiomony of the pensioner that she had been allowed the pension and had been receiving it was rejected and the prisoner was acquited. If the particular pension must be proved by the record, must not the allowance thereof be averred in the indictment? The first step of the government, in cases of this character, is proof that the pension has been allowed. Can that fact be proved, if it be not averred in the indictment? Certainly not. It is not averred in this indictment. The defect is fatal to the judgment. It must be arrested.

It would be an unwarrantable interference with the citizen's liberty to prohibit him from doing what he shall deem proper with his own money.

The citizen may have a vain hope that he can, under proper advice and direction, procure a pension from the United States, and may be willing to

pay, and may pay a large fee for that advice and direction. But, the hope may be utterly vain, and no pension may ever be granted; but with the compensation for such advice and direction Congress is not concerned, and can not regulate what shall be paid for it.

There can be no felonious or wrongful conduct imputed to defendant if the pensioner voluntarily paid to him a sum of money exceeding ten dollars. The mere fact that defendant received from Julia Johnson and retains a sum of money greater than ten dollars is not *per se* wrongful, unless by false and fraudulent devices, practiced upon the pensioner he induced her to deliver the money. What false and fraudulent devices, if any, were practiced by defendant in procuring the money from the pensioner must be pleaded upon the face of the indictment, so that the Court can determine whether they are, in law, wrongful. But there is nothing averred upon the face of this indictment, other than the legal conclusion that defendant "wrongfully and feloniously demanded, received ond retained a sum greater than ten dollars, the exact amount thereof being to the jurors unknown."

But when the pension money reaches the hands of the pensioner, the Congress has no power to declare how the pensioner shall use it, be-

cause it is the pensioner's money—his property; and, if the pensioner sees fit to give any part of the pension money, voluntarily, to his attorney or to his agent, there is no wrongful receiving or retaining on the part of the agent; and the Congress can not by mere words transmute a pensioner's voluntary gift into a crime. The Congress can not convert a mere recipient of a pensioner's liberality into a criminal.

IV.

The Court will please take judicial cognizance of the fact that the Congress has prohibited payment of all pension money to all agents or attorneys, excepting only the compensation allowed them by the statute, which is limited to the sum of ten dollars; the statute expressly provides, that sum shall be paid only upon the order of the Commissioner of Pensions by the pension agent who pays the pension to the person designated by the pensioner. How can any person not named take or receive the ten dollars or any sum greater than it?

How is it possible for any agent or attorney to get into his possession any part of the pensioner's pension money? In no other way except by the pensioner's voluntary delivery of it into the hands of the agent or attorney, or by the fraud and deception of the agent or attorney. If the pen-

sioner voluntarily delivers the whole or a part of the pension money to the agent or attorney, for a specific purpose, and he then withholds it, disregarding the purpose for which it was delivered, he might be within the reach of the Statute, and he might be treated as wrongfully withholding it. But the facts to establish such a wrongful withholding must be pleaded upon the face of the indictment, for the Court to judge whether they are, in law, a wrongful withholding. Moreover, if the agent or attorney by false and frudulent pretences procures possession of any part of the pension money and withholds it after proper demand madé for it, he would be within the meaning of the statute. Such facts, the demand and refusal to pay, must be averred in the indictment. Nevertheless no such facts are pleaded in the indictment now under examination. The defendant is accused of merely demanding, receiving and retaining a greater sum than ten dollars, while it appears that by the force of the statute the pension money must *per force* pass from the hands of the government officials into the hands of the pensioner, but nothing is stated upon the face of the indictment showing how or by what means the defendant obtained any money of Julia Johnson. Is it possible for defendant to prepare any defence to meet an accusation so vaguely and indefinately stated.

In the case of *Cruikshank vs. United States*, 92 U. S., 542, this Court said: "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquital for protection against a further prosecution for the same cause; and, second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient, in law, to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of facts and intent, and these must be set forth in the indictment with reasonable particularity of time, place and circumstances."

Again in *Hess vs. United States*, 124 U. S., 483, this Court said: "Undoubtedly the language of the statutes may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

V.

There is no averment in the indictment that any certain sum of money greater than ten dollars was received, demanded or retained by the defendant. The pleader has vaguely averred that de-

fendant did then and there feloniously and wrongfully receive, demand and retain of and from the said claimant for his said services in preparing, presenting and prosecuting her said claim for pension aforesaid, a sum of money greater than ten dollars, "the exact amount thereof being to the jurors unknown."

Defendant's liability does not begin, until he has received some part of the eleventh dollar. What part thereof did he receive and retain? The averments answer, The exact amount is unknown.

The vice in this averment is, that any sum of money, however small,—ten cents, or even one cent, would satisfy the averment. The law maker certainly did not intend that citizens of the United States should be subjected to criminal prosecutions, involving the humiliation and expense of defending them, and the risk of several year's servitude at hard labor for retaining a trifling or frivolous sum of money. *De minimis non curat lex.* The law of pleading permits the pleader to state any sum, under a videlicet, sufficiently large, to show, *prima facie*, a substantial violation of the statute. But the Court will please observe there is no sum stated. *In both counts of the indictment* the grand jurors upon oath declare that no evidence has been laid before them to show what sum of money, if any, greater than ten dol-

lars, had been received or retained by the defendant. The fact is distinctly stated by the grand jurors and by the District Attorney that they know nothing about the sum the defendant had wrongfully received and retained. It follows, therefore, that neither the grand jurors, nor the district attorney, nor any government official, nor any witness, knew that the defendant had committed any substantial breach of the statute at the time the indictment was presented.

The question is, Ought any citizen of a free government to be stigmatized as a criminal and compelled to defend an indictment which upon its face shows no cause of action? Does it comport with a proper and just administration of justice in a free government, that the citizen should be dragged to the bar to defend an accusation which the grand jurors upon their oaths say they know nothing of? Is such a document an indictment under the law of the land? Most assuredly it is not. For these reasons defendant submits his demurrer to the indictment, and his motion in arrest of judgment should have been sustained.

VI.

The Congress of the United States has no power to limit the compensation that lawyers shall receive for professional services in any case

whatsoever; and, any attempted limitation in that respect is unconstitutional and void.

If the Congress has that power then it may limit the compensation of all lawyers for any and all professional services rendered in all cases brought by any citizen against the United States. For no suit can be brought against the United States except by consent of the Congress; and in giving that consent, the Congress, if it has power to limit lawyers compensation in pension cases may couple the consent with a limitation for compensating lawyers who prosecute the suits; and where shall the limitation stop? If any limitation in that respect is within the power of Congress, it may be carried to so low a degree as to prevent respectable lawyers from prosecuting any cases against the United States; and in that way the Congress might utterly destroy the rights of citizen against the government. Defendant submits that the Congress in attempting to limit lawyers compensation to ten dollars for preparing, presenting and prosecuting claims of pensioners is unconstitutional and void.

The court will please observe, the defendant is not accused of violating the statute in his character as agent or attorney; but the accusation against him is, that as a lawyer he has violated the fourth section of the act of June 27th, 1890.

VII.

There is no averment in the indictment that any demand has ever been made upon defendant for any money by him wrongfully withheld from any pensioner of the United States. It is impossible for the mind to grasp a wrongful retaining or withholding of anything, until an opportunity shall have been given the party complained against to return the thing withheld.

The late Mr. Justice Miller said: "By the third section of the latter act pensions are forbidden to be paid to attorneys and agents, and are required to be paid directly to the pensioner. It is not easy to see therefore how the attorney is to get possession of the money, and how he can withhold it, or why there should be any longer a law for punishing him for such withholding. * * It is not very easy, to define, for all purposes, what constitutes, under the statute, a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this, what that is must depend in each case on its own circumstances. A refusal to pay on demand without just excuse would constitute a withholding at once. Such delay as would show an intention to

evade payment would constitute a withholding. If there is nothing but careless delay the party might hold the money for some time without incurring this severe penalty of two years imprisonment. In short there must be such unreasonable delay, some refusal to pay *on demand*, or some such intent to keep the money wrongfully from the pensioner as would constitute an unlawful withholding in the meaning of the law." *United States vs. Irvine*, 98 U. S., 451, 452

There is no averment in the indictment that any demand was ever made upon the defendant for any money by him wrongfully withheld. There is not the slightest suggestion that the defendant knew or had reason to know that he retained or withheld any pension money to which any pensioner of the United States, or even Julia Johnson was entitled. For aught that appears upon the face of the indictment defendant's attention had never been directed to the matter complained of.

VIII.

All offences against the United States are statutory. There is no common law offense against the United States. Every offence of every name or nature punishable by the courts of the United States, must be against the express provisions of some statute of the United States.

Every count in every indictment for every offence committed against the United States must contain a positive averment that the thing charged is contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States. This averment is jurisdictional. And if it be not so averred, the count is void.

The first count of the indictment under examination contains no such averment. It concludes as follows: "In that he did then and there feloniously and wrongfully demand, receive and retain of and from the said claimant, etc., a sum of money greater than ten dollars, the exact amount thereof being to the jurors aforesaid unknown."

The second count of the indictment is also fatally defective, because the averments therein stated and set forth are conflicting and repugnant, in this. The defendant is charged in that count as a person engaged in preparing, presenting and prosecuting a certain other claim for pension upon and against the United States made by and in behalf of the said Julia Johnson for pension, under the provisions of the said act of Congress, etc., which said claim is in the words and figures as follows, to-wit: (and then follows Julia Johnson's claim for widow's pension.) In that dec

laration, which is part of the second count, it appears that she "hereby appoints L. C. Wood & Co., United States pension attorneys, 512 F street, N. W., Washington, D. C., her true and lawful attorneys to prosecute her claim," and she agrees to pay her said attorneys the lawful fee of ten dollars for their service, when the pension shall be allowed.

Here are perfect, clear and certain conflicting and repugnant averments. The defendant submits that according to Julia Johnson's sworn statement, the defendant could not, and therefore did not have anything to do with the preparing, presenting and prosecuting Julia Johnson's claim for pension, and for that reason the demurrer should have been sustained, and the judgment should have been arrested.

IX.

The record fails to prove the indictment, "*a true bill.*" There is nothing in the record tending to show that any person, purporting to be foreman of the grand jury endorsed the indictment, A True Bill. This defect is fatal. The law on this subject has come down through centuries. One of the oldest cases on the subject, decided in 1825 is, *Nomanque* vs. *The People*, 1 Breeze, 109, in which the court said, "The proceedings were *coram non judice*. The objection going to the power of the

court to try the prisoner, on that indictment, may, although not noticed or urged below, be now urged as cause of error."

Plaintiff in error respectfully prays the court here to set aside the judgment, and order a new trial.

O. B. SANSUM,
Attorney for Plaintiff in Error.

O. B. Sansum
atty.

Office Supreme Court U. S.
FILED.
MAR 1 1895
JAMES H. McKENNEY,
CLERK.

157-160

157-160

CASE No. 15695.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY N. FRISBIE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 811.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY N. FRISBIE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 811.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error was indicted under § 4 of the pension act of June 27, 1890, for the crime of charging and receiving over $10 for preparing a pension claim under that act. The offense was committed January 3, 1894. He was tried before Judge Parlange and a jury, and convicted February 8, 1894.

STATEMENT OF FACTS.

The statutory provision under which plaintiff in error was convicted is as follows:

> That no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim

> under the provisions of this act shall, directly or indirectly, contract for, *demand, receive, or retain* for such services in preparing, presenting, or prosecuting such claim a sum greater than ten dollars, which sum shall be payable only upon the order of the Commissioner of Pensions, by the pension agent making payment of the pension allowed, and any person who shall violate *any of the provisions of this section*, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such pensioner or claimant under this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offence, be fined not exceeding five hundred dollars, or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the court.

The first count of the indictment charges that on the day named plaintiff, "being a person engaged in preparing, presenting, and prosecuting a claim for pension" under said act, and on behalf of one Julia Johnson, widow of a deceased soldier, did feloniously and wrongfully violate the provisions of said section as follows:

> In that he did then and there feloniously and wrongfully demand, receive, and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting, and prosecuting her said claim for pension aforesaid, a sum of money greater than ten dollars, the exact amount thereof being to the jurors aforesaid unknown (p. 1).

The second count of the indictment related to a similar offense connected with another pension claim made on the same day. It is similar in form, but fuller, setting out the claim *verbatim*.

A demurrer having been overruled, and the prisoner having been tried and convicted, he moved for a new trial, and also moved in arrest of judgment. Both motions were denied. There is no bill of exceptions. The only objections relate to the form and substance of the indictment.

The defendant was sentenced to imprisonment at hard labor for three months; and under the provisions of § 5542 and § 5546 of the Revised Statutes this confinement was directed to be in the penitentiary at Albany, N. Y.

ARGUMENT.

There are two sets of assignments of error in this record, one at pages 8 to 9, and another at pages 14 to 16. We shall take up the former *seriatim*, and our remarks will be applicable to the latter.

I. The only material point raised by the demurrer to the indictment is the alleged unconstitutionality of the act under which the indictment was found. Defendant claims that Congress can not "regulate the price of labor, nor impair the obligation of contracts," and therefore cannot regulate attorneys' charges upon applications for pensions (p. 3).

This objection does not rest upon any authority. On the other hand, the authorities are very clearly the other way.

"Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." (*United States* v. *Teller*, 107 U. S., 64, 68.) They rest upon the war power (*United*

States v. *Hall*, 98 U. S., 343, 351), and the pension system is regarded as an important method of securing good military and naval services whenever need shall arise; but the pension is, nevertheless, a mere donation (*Id.*, pp. 351, 357); pensioners "are, in certain aspects, wards of the United States" (*Id.*, p. 353); and "the United States, as the donors of the pensions, may, through the legislative department of the Government, annex such conditions to the donation as they see fit to ensure its transmission unimpaired to the beneficiary" (*Id.*, p. 357); and "inasmuch as the donation is a voluntary gift, the Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary, which is all that is necessary to decide in this case." (*Id.*, p. 358.)

In the case just cited it was immaterial to consider whether the pension moneys could be protected after they were received by the beneficiary, and this may be said also of the case at bar, since it does not appear whether the moneys exacted by defendant were received by him before or after the granting of the pension. Whenever they were paid, the consideration for the payment was one arising prior to the granting of the pension—namely, the value or supposed value of services rendered by defendant as agent or attorney.

The principles laid down in the Hall case clearly apply here. The pensions under the act of 1890 are not even invalid pensions given for injuries received during the war. They are bounties or donations from Congress in the strictest sense. Congress can affix any conditions to ensure that the whole of it gets into the hands of the per-

son for whom it is intended. It could, if it pleased, require all applicants to appear personally before some pension agency, so that the assistance they needed should be rendered by the sworn officers of the Government, and reimbursed by Government salaries. Congress had the right to say: "Rather than have these bounties divided up among attorneys, either before or after they are paid to the pensioner, we would abandon the system altogether. Rather than abandon it, we will make paid assistance to the pensioner beyond the limit of $10 a *malum prohibitum*, and protect the bounty by penal enactments." A lawyer can not have any vested right connected with practice in a *forum* which Congress may abolish at any moment.

Congress therefore had provided for a complete staff of clerks to pass upon these applications, including skilled medical men, and at least one lawyer. (Appropriation act of 1890, 26 Stat., 258.) Applicants for pensions receive, "free of all expense, all such printed instructions and forms as may be necessary in establishing and obtaining said claim." (Rev. St., § 4748.) Oaths to vouchers are administered free of charge. (Act of March 1, 1889, ch. 332; Supp., 670.) The fees for examination of pensioners by travelling surgeons are paid by the Government. (Rev. St., § 4777.) No legal formalities are required upon an application for a pension. It is only required that the application should be in writing and sworn to (Rev. St., § 4714), and the oath can be taken before any justice or notary (act of July 1, 1890, ch. 646; Joint Res. of Sept. 1, 1890, No. 43). The $10 allowed for an attor-

ney is ample payment even for the slight assistance an ignorant or illiterate applicant may require. The statute is therefore entirely reasonable in its requirements.

The position taken by plaintiff in error, that he had a constitutional right to assist applicants for pensions, is inconsistent with the fact that the pension is a gift or bounty, upon which conditions may be imposed *ad libitum*. No alteration of the law is made in this respect by the curious statute discussed in 20 Op., 735.

The right of Congress to impose a *maximum* limit upon attorneys' fees, and make a charge above the amount so fixed criminal, has not been directly ruled by this court; but cases in the lower Federal courts to that effect were cited and expressly approved by Mr. Justice Clifford in *United States* v. *Hall*, *supra*, at pages 355–6. The same ruling was made by Judge Shiras, of the northern district of Iowa, in *United States* v. *Van Leuven* (62 Fed. Rep., 52, 56), the court saying:

> It has never been doubted that Congress can regulate the fees demandable by the clerks or marshals of the courts of the United States for services rendered the individual citizen in the prosecution of claims in the courts, although such claims may be wholly private in their nature, and not be part of the public bounty, as in the case with pensions. The right of Congress to regulate the amounts demandable of pensioners or pension claimants for services rendered in connection with the procurement of pensions, or an increase thereof, has two substantial grounds of support, to wit, the necessity of protecting the citizens, who are seeking the bounty of Government, from all imposition and extortion, and the necessity of protecting the Government against false, fictitious, or

greatly magnified claims, worked up by agents who have contracted for, or expect to get, a large share of the claim that may be allowed. The right of Congress to legislate on this subject seems to me clear beyond question.

II. The technical objections to the first count of the indictment may all be disposed of by comparing the plaintiff in error's specifications with the statute itself and with the indictment. It is not necessary that the pension should be actually allowed. An overcharge is criminal in character whether the applicant's claim be sufficient or insufficient. It is equally criminal whether the charge be collected as a retainer at the commencement of the proceedings, or out of the pension moneys received at their conclusion. For reasons above stated, Congress can cut down the right of assistance to fraudulent and unsuccessful claimants as well as to those who secure its bounty.

The second count of the indictment it is unnecessary to consider, there being a general verdict of guilty. (*Evans* v. *United States*, 153 U. S., 584, 595.)

III, IV. These assignments repeat the constitutional objections above considered.

V. This is a purely formal objection not made till after the verdict. It is disposed by § 1025 of the Revised Statutes. Nor is there any such requirement as is here referred to.

VI. This is not an assignment of error at all within the meaning of Rule 35. It does not set out any alleged

error "particularly." It is sought to be applied to supposed informalities in the indictment; which informalities if there be any, are cured by the section last referred to. A variety of similar informalities were pressed upon the court by plaintiff in error in *Coha* v. *United States*, 152 U. S., 211, but were not regarded as worthy of notice in the opinion. Informalities which were not brought to the attention of the trial court are especially to be overlooked here. (*Westmoreland* v. *United States*, 155 U. S. 545., 548–9.)

VIII. This assignment does not seem to require discussion.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
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Office Supreme Court, U. S.
FILED.
MAR 7 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY N. FRISBIE, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 811.

SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR.

The undersigned respectfully asks leave to submit the following authorities bearing upon the question whether the omission of the foreman's indorsement upon an indictment is a defect which can be availed of upon writ of error, if not objected to at the trial, or on motion in arrest of judgment.

An investigation of the authorities leads to the following conclusions: In England an indictment must be indorsed "a true bill" for reasons peculiar to the practice there, as the true and untrue bills are all returned together. The custom of indorsing true bills is general in America, by tradition and convenience, and is often required by statute. The authorities conflict as to

whether it is essential, but the weight of authority is that it is not essential. Even those holding it essential concede it to be a matter of form, curable when there is a Statute of Jeofails.

Mr. Bishop says (1 Bish. Crim. Proc., § 700):

> In the absence of a mandatory statute, it is the better view that both the words "a true bill" and the signature of the foreman may be dispensed with if the fact of the jury's finding appears in any other form in the record.

Mr. Wharton says (Wharton's Crim. Plead. & Pro. § 369):

> In those States in which it is the practice for indictments to be prepared complete by the prosecuting attorney and submitted *as such* to the grand jury for their action, the assent of the grand jury is signified by the indorsing on the bill of the words "true bill," with the foreman's name attached, while an ignoring of the bill is signified by indorsing of the word "ignoramus", with the foreman's name attached. When this is the practice, or when the foreman's signature is required by statute, the omission of the words "true bill" with the foreman's name is fatal *if the objection is taken before verdict.* * * * In those States, on the other hand, in which the action of the grand jury approving of the principle of a bill is prior to the presentation of a bill by them, then the attestation of the foreman is not the primary proof of approval, and may be omitted.

In *State* v. *Magrath*, 44 N. J. Law, 227, the whole subject is examined by Chief Justice Beasley, who expresses approval of Mr. Bishop's conclusion. After discussing

the reason for the English rulings, he says that where the bills are drawn up after the investigation before the grand jury—

> The result is that all the bills which the grand jury bring into court are such as have been found by them, and therefore the act of presenting them to the court is a certification that they have been officially found. * * * I confess that I do not see such an assurance as the grand jury makes to the court on this subject, in our practice, should not be held to be sufficient. The bills presented are in court openly declared by the grand jury to be the bills which they have found.

In *Commonwealth* v. *Smyth*, 11 Cush., 473, the English and the American practice are set forth at length by Judge Merrick, who shows clearly why the words "a true bill" are not essential here, as no other bills are here returned by the grand jury. In this case the foreman signed, but that does not appear to have been regarded by the court as an essential.

In *State* v. *Creighton*, 1 Nott & McC., 256, decided by the supreme court of South Carolina in 1818, defendants, having been convicted of an assault, "moved to arrest the judgment on the ground that the finding of the grand jury had not been signed by the foreman." The trial judge granted the motion, but the supreme court reversed him, Judge Johnson saying:

> The finding of the grand jury is an expression of their conviction as to the truth of the charge contained in the indictment, and it is only necessary that it should be done in such a manner as to prevent misconstruction or perversion. It has long been a cus-

> tom in this State for the foreman of a grand jury to *sign* their finding, and perhaps it would still be advisable to adhere to it. But I concur in the opinion that its being in writing and having been publicly announced by the clerk, as is invariably the case, in the presence of the grand jury, is a sufficient guard against misconstruction or perversion; and as there is no positive law requiring it, that it is not essentially necessary to its validity that it should be *signed* by the foreman.

This decision is cited with approval in *McGuffie* v. *State*, 17 Ga., 497, 510–1; and the same ruling is made in *State* v. *Mertens*, 14 Mo., 94; *State* v. *Burgess*, 24 Mo., 381, and *Wau-kau-chaw-neek-kaw* v. *United States*, Morris (Iowa), 332; *State* v. *Agnew*, 52 Ark., 275. The Mertens Case was approved on this point by Mr. Justice Field (then chief justice of California) in *People* v. *Lawrence*, 21 Cal., 368, 373; the case, however, turning on a statutory provision.

The same ruling was made in *State* v. *Cox*, 6 Ired., 440, 446, the court saying:

> The custom of endorsing the bill is declared to be no further material than as it identifies the instrument, expressing the decision of the jury; when made, it becomes no part of the indictment. (*Vd.*, 99.) It is the action of the jury in publicly returning the bill into the court as true, and the recording or filing it among the records, that makes it effectual.

In *State* v. *Freeman*, 13 N. H., 488, the words "a true bill" were held unnecessary, though the signature of the foreman had previously been held essential in that State.

In *Gardner* v. *People*, 3 Scam., 83, the court held that the signature of the foreman, though a statutory requirement, would be presumed if the indictment was recorded.

Price's Case, 21 Grat., 846, 856–62, contains a careful discussion of the principles and authorities bearing on this point, by President Moncure of the Virginia court of appeals. He fully sustains the position that the endorsement "a true bill" and signature of the foreman are in America, in general, merely a convenient formality. Accordingly it was held proper to overrule even a demurrer to the indictment under these circumstances.

In *Webster's Case*, 5 Greenl., 432, the supreme court of Maine decided that the omission of an indorsement was fatal, but conceded that the defect was merely one of form, and based their decision on the fact that there was no Statute of Jeofails in criminal proceedings. Even in this case the objection was raised by motion in arrest of judgment.

In *State* v. *Clarkson*, 3 Ala., 378, 383, Goldthwaite, J., said (commenting on a plea "that the bill of indictment was not found and returned into court by a grand jury of said court, according to the forms of law"):

> The fact to be proved, or rather disproved, was the authenticity of the indictment as a record of the court * * * The very fact of pleading to it admits its genuineness as a record.

There being no statute, it is respectfully submitted that the Federal courts are bound to no greater formality than the courts of this country in general; that the reason for the English rule fails where there is a district attorney to

represent the prosecution; and that, if available on motion to quash, the objection is cured after verdict by Rev. St., § 1025.

If, then, the words "a true bill" are not an essential part of the indictment, but merely the best evidence of it, we have in the present record the following evidence that the paper headed "Indictment" is really such: its presence as part of the record of the court; the indorsement of the assistant district attorney; the statement of defendant that it is an indictment, four times repeated, in the demurrer, plea, motion for a new trial, and motion in arrest of judgment; and the recital by the court in sentencing the prisoner that he was "duly indicted and arraigned."

It is further submitted that all defects of this kind were waived by the prisoner when he "waived the formal reading of the indictment *herein found and presented against him*" (p. 4). He thus, perhaps, prevented the court from giving its personal attention to the matter.

Respectfully submitted.

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